**IN THE HIGH COURT OF JUDICATURE OF BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

NOTICE OF MOTION NO.353 OF 2007
IN
SUIT NO.227 OF 1992

Punaji Tukaram Naik. ..Plaintiff.

V/s.

M/s.Gujarat Fluro Chemicals Ltd. & Ors. ..Defendants.

Mr.H.V.Chande for plaintiff.

Mr.Harish Pandya with Aditya Khanna i/b. M/s. Khaitan & Co. for defendants.

**CORAM: A.M.KHANWILKAR,J**

**DATE : JUNE 19, 2007.**

**P.C. :**

1. Heard counsel for the parties.

2. Preliminary objection is taken on behalf of the plaintiff about the maintainability of the present Motion under Order 9 Rule 13. It is not in dispute that the order in question of exparte decree dated 8th January, 2007, is passed by this Court in exercise of powers under Order 8 Rule 10 of CPC. That fact is stated unambiguously in the subject order itself. Relying on that fact, the counsel for the plaintiff submits that the present application under Order 9 Rule 13 is not maintainable in view of the exposition of the Division Bench of our High

Court in the case of **Dhanwantrai R. Joshi & Ors. V/s. Satish J. Dave & Ors. reported in 1999(1) Bom.C.R.97.** The stand taken by the plaintiff has been directly answered in the said reported decision.

3. However, to get over this decision, counsel for the defendants/applicants has relied on following decisions.

(i) **AIR 1999 Supreme Court 3381(Balraj Taneja & Anr. V/s.Sunil Madan & Anr.)**

(ii) **AIR 2000 Supreme Court 1221(G.P.Srivastava V/s.R.K.Raizada & Ors.)**

(iii) **(2002) 5 Supreme Court Cases 377(Sushil Kumar Sabharwal V/s. Gurpreet Singh and Ors.)**

(iv) **JT 1998(3) S.C.504(G.Raj Mallaiah & Anr. V/s. State of Andhra Pradesh)**

(v) **(2005) 1 Supreme Court Cases 787(Bhanu Kumar Jain V/s. Archana Kumar and anr.)**

(vi) and lastly the decision of the Division Bench of the Delhi High Court reported in **AIR 1994 DELHI 367 (Gujrat Co-operative Oil Seeds Growers Federation V/s. Smt.Ramesh Kanta Jain)**

4. In my opinion, none of the decisions pressed into service by the defendants except the decision of the Delhi High Court is directly on the point. In all the decisions of the Apex Court, the issue was regarding the scope of discretion available under Order 9 Rule 13 of CPC. In none of the reported

decisions, the Apex Court has specifically dealt with legal issue raised on behalf of the plaintiff which has been answered by Division Bench of our High Court in the case of **Dhanwantrai R. Joshi & Ors (Supra).** In substance, the decisions of the Apex Court pressed into service on behalf of the defendants are inapposite and will be of no avail. The only decision directly on the point which has been relied upon by the Counsel for the defendants is the case of **Gujrat Co-op. Oil Seeds Growers Federation (Supra),** Division Bench of the Delhi High Court. Indeed, the Delhi High Court has adverted to several other decisions including the two Supreme Court decisions reported in **AIR 1987 SC 42 and AIR 1988 S.C.1381 to** hold that the same are directly on the point. However, those decisions are not pressed into service before me nor cited across the bar. For the present, suffice it to observe that I am bound by the statement of law expounded by the Division Bench of our High Court in the case of **D.R.Joshi & Ors.(Supra).**

5. Counsel for the defendants had strenuously argued that although the order in question records that the same was passed in exercise of powers under Order 8 Rule 10 of CPC, however, in fact, the same

has been passed in exercise of some other provision and not ascribable to provision of Order 8 Rule 10 as such. It is not possible to countenance this submission. The defendants cannot, on the basis of some contemporaneous circumstances, be permitted to contend contrary to the record of the Court. Record of the Court unambiguously mentions that the order is passed under Order 8 Rule 10. It is well established that the fact so stated in the order is final. Going by that statement of fact, it logically follows that the present application purported to be filed under Order 9 Rule 13 is not maintainable, in view of the principle expounded by the Division Bench of our High Court in the case of **D.R.Joshi(Supra)**. Accordingly, this Motion fails. The same is dismissed.

6. It is however, made clear that dismissal of this Motion will not preclude the defendants/ applicants to take recourse to other remedy, as may be permissible; which will be decided on its own merits in accordance with the law, uninfluenced by any observations in this order.

7. At this stage, counsel for the defendants/applicants insists that his submission that no opportunity was given to the defendants, as

the name of the advocate for the defendant was not appearing on the board, be considered and answered. Needless to observe that the said plea will be relevant to consider the argument on merits only if the Court were to hold that the application under Order 9 Rule 13 was maintainable. That argument would have been relevant to ascertain whether sufficient cause was made out by the defendants/applicants. On the finding recorded earlier, it is not necessary for this Court to dwell upon the correctness of the said contention.

8. At this stage, counsel for the defendants/applicants seeks limited protection to enable the defendants to take up the matter before the appropriate Court. Although the Counsel for the plaintiff submits that there is no interim protection operating in favour of the defendants as of now and that the plaintiff has no intention to execute the decree for a period of two weeks from today. That period is more than sufficient for the defendants to take recourse to appropriate remedy, as may be advised.